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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

NO. ~~344 MISC.~~ 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents

(Petition for Writ of *Certiorari* to the Supreme Court of Illinois)

BRIEF IN OPPOSITION

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (346-2000),
Attorney for Respondent, People of the State of Illinois.

JOHN J. STAMOS,
State's Attorney of Cook County, Illinois,
500 Chicago Civic Center,
Chicago, Illinois 60602,
Attorney for Respondent, Joseph Woods, Sheriff of Cook County, Illinois.

JOHN J. O'TOOLE,
DONALD J. VEVERKA,
Assistant Attorneys General,
ELMER C. KISSANE,
JAMES B. ZAGEL,
JOEL M. FLAUM,
Assistant State's Attorneys,
Of Counsel.

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BRIEF IN OPPOSITION

OPINION BELOW.

The opinion of the Supreme Court of Illinois, reported at 36 Ill. 2d 471, 224 N.E. 2d 259 (1967), is reproduced in Appendix A to the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW.

1. Is a juror who will not, under any circumstances, return a death penalty verdict an "impartial" juror in a case where the People seek the death penalty for murder of a policeman? Is the State constitutionally prohibited from disqualifying such jurors in such a death penalty prosecution?
2. Are the constitutional rights of a defendant violated by a procedure wherein the jury fixes the penalty and the defendant is permitted to introduce evidence in mitigation before the jury?
3. Is the Illinois procedure which allows for commutation of the death penalty by the Governor on grounds of rehabilitation violative of due process? Is the State required to provide a judicial hearing on the question of rehabilitation? Is the State constitutionally prevented from setting the death penalty for the crime of murder? Is the death penalty cruel and unusual punishment when a defendant deliberately murders a uniformed police officer acting in the line of duty? Is this Court the proper forum for a debate and decision concerning the wisdom of capital punishment?
4. Where the facts surrounding the giving of pre-trial statements, made prior to *Escobedo* v. *Illinois,* are brought out in a motion to suppress, and the statements are clearly voluntary, is there any purpose

served by a further judicial review of the "totality of the circumstances" surrounding the statements?

5. Whether a convicted defendant must be given a hearing to present a newly discovered witness, when the petition fails to show that the movant has been diligent, when it fails to show that the witness' testimony is conclusive rather than merely cumulative, and when the petition is not supported by an affidavit from the witness?

6. Is a State court constitutionally required to impanel a jury to decide a defendant's competency to stand trial when defendant's counsel requests and is granted a psychiatric examination of defendant, when the psychiatrist diagnoses defendant as competent, and when no request for a hearing is made?

7. Does the Illinois practice of allowing impeachment of a defendant who testifies, by showing that the defendant has been previously convicted of an "infamous crime," deprive defendant of a fundamentally fair trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

These are adequately set forth in the Petition.

STATEMENT OF THE CASE

The Murder

At about 4:30 A.M. on April 29, 1959, during the course of an attempt to evade arrest by a uniformed Chicago patrolman, William Witherspoon shot and mortally wounded the patrolman, Officer Mitchell Stone. (A. 11, 25, 55)* Immediately after shooting Officer Stone, Witherspoon kicked the wounded officer's hand and knocked the officer's service revolver from his grasp. (A. 94) Witherspoon then fled the scene without stopping to aid or to obtain help for the dying patrolman. (A. 139) At the time of the shooting, there were three outstanding warrants for Witherspoon's arrest. Each of these was introduced at trial on the question of motive, and they are as follows:

> People's Exhibit 1—Arrest warrant charging Armed Robbery of $125.00 U.S.C., issued April 19, 1959, City of Detroit, Wayne County, Michigan. (A. 72)
>
> People's Exhibit 2—Arrest warrant charging Armed Robbery of $3,000 U.S.C. and diamonds valued at $7,000.00, issued April 22, 1959, City of Lincoln Park, Wayne County, Michigan. (A. 77)
>
> People's Exhibit 7—Warrant charging unlawful flight to avoid prosecution, issued April 27, 1959, United States District Court, Eastern District, Michigan. (A. 83).

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* "A" refers to the printed Abstract filed in the Illinois Supreme Court on petitioner's original appeal. "R" refers to the transcript of petitioner's trial found in Volumes I, II, and III. "Abst." refers to the printed abstract filed in the Illinois Supreme Court in the instant case. This is the usage adopted in Petitioner's Brief.

The events leading to the murder, as brought out by the evidence, are as follows: On April 24, 1959, William Witherspoon (petitioner herein) and Frank Osso (a/k/a Frank Dyrda) arrived in Chicago from Detroit in petitioner's automobile, carrying with them a quantity of jewels, the proceeds of a Michigan armed robbery, and a Random Polish military pistol. (A. 90, 123, 134, 143). Witherspoon was familiar with Chicago, having been in and out of the city throughout the years when he worked occasionally as an interstate truck driver. (A. 135) Witherspoon checked into a motel on the South side of Chicago, 2300 South Michigan, and the next day, April 25, 1959, he rented an apartment at 4650 West Maypole Avenue, on the West side. (A. 133)

On April 28, 1959, the petitioner had the loaded pistol (People's Exhibit 3) on his person. He had reason for thinking it was "necessary." (A. 134) Witherspoon was familiar with small arms. (A. 143). Through the evening of April 28 and the early morning of April 29 the petitioner carried the pistol in a concealed manner for ten to twelve hours while he went about various places in Chicago. (A. 135, 136-37).

Witherspoon and Frank Dyrda had parked the petitioner's car in a gas station parking lot on the southeast corner of 11th and Wabash sometime during the early morning of April 29. They went to several taverns and the petitioner drank "conservatively" (A. 124), "because I knew I had a loaded gun" (A. 136).

In a tavern in the vicinity of 11th and Wabash Witherspoon met one Helen Murray, whose name, address and telephone number he originally concealed from the police. (A. 91, 134) After his arrest, petitioner told police that he gave her $50.00 to spend the night with him. (A. 91)

At trial, Witherspoon testified that he took the diamonds to Helen Murray, and that she agreed to arrange a Chicago fence for the jewels he brought from Detroit. (A. 123-24) He further testified that he gave her $50.00 because she said that she was indebted to the fence and needed the $50.00 to square the debt. (A. 123)

Witherspoon told the police that Helen Murray decided not to spend the night with him. By this time, around 4:00, a.m., all the taverns were closing and Witherspoon, Dyrda and Helen Murray were in a restaurant at Wabash and Roosevelt (formerly 12th Street). Helen Murray left the restaurant, and Witherspoon followed her into the street. Dyrda remained in the restaurant. Witherspoon and Helen Murray then began to argue while on the southwest corner of Wabash and Roosevelt. Witherspoon was holding on to her but she pushed him in the chest and wrenched herself from his grasp. (A. 6, 8-9, 91-92).

At this time a marked Chicago police squad car, containing uniformed officers Mitchell Stone and Gerald Marzillo and assigned to patrol the area, came up to the corner and stopped for a red light. After wrenching free from Witherspoon, Helen Murray ran to the squad car and told Officers Stone and Marzillo that the defendant was carrying a gun. (A. 5, 6, 9)

Witherspoon, who was at the rear of the squad car, heard the conversation between the policemen and Helen Murray. (A. 92) He fled immediately, walking very fast across the street into a parking lot and hiding there in one of many parked trailers and tractors. Officers Stone and Marzillo turned on the flashing red light atop the squad car. Officer Marzillo called out to the defendant. (A. 6, 9, 10) Both officers left the car and began to search the parked tractors and trailers using

flashlights. (A. 6) Then Witherspoon leaped from one of the trucks and started to run east on Roosevelt toward Michigan Avenue, which is one block east of Wabash. Officer Stone gave chase and yelled for Witherspoon to stop. Officer Marzillo returned to the squad car and started to drive east on Roosevelt toward Michigan Avenue when he heard gunfire. Officer Marzillo put through a radio call for help and began a search. He found his partner, Officer Stone, wounded in a parking lot at 1241 South Michigan. The dying Officer Stone told Officer Marzillo what had happened and gave him a description of Witherspoon. (A. 71, 125. See A. 26)

What had happened was this: Witherspoon, with Officer Stone in pursuit, reached Michigan and ran south thereon to the parking lot at 1241 South Michigan. He sat down and hid in one of the many two-wheel trailers in the lot (A. 93, 126) Witherspoon saw the uniformed officer enter the lot and flash his flashlight into the trailers. (A. 126) When Officer Stone found the petitioner hiding in a trailer, he said, "You've got a gun. The girl told me. I want it." (A. 127) The officer then turned off his flashlight and began to search the petitioner, who held the gun in his hand. Officer Stone, who was a young and somewhat inexperienced police officer, conducted what Witherspoon called a "very bad" search and failed to find the weapon. He then told Witherspoon to get out of the trailer. (A. 3, 126) In Witherspoon's words, "as I approached the policeman I fired a shot at him." (A. 16) Witherspoon fired a series of shots from the Random pistol, a lueger. (According to a witness, the lueger shots came first. (A. 25)) Officer Stone fired shots in return and Witherspoon fired again. (A. 11, 25, 55).

The petitioner's comment on the incident was, "The officer was doing his job and it was my job—I was trying to get away, to avoid arrest." (A. 94, 139)

After Officer Stone fell to the ground, Witherspoon kicked the officer's gun from his hand. (A. 94) Petitioner did not give any aid to or attempt to secure help for the wounded officer. At trial Witherspoon said ". . . I never at any time endeavored to get any type of medical help to this officer that had been shot . . . I was interested in getting out of that area quickly . . . The only one I was interested in that night was Witherspoon." (A. 138-39)

Witherspoon fled to the gas station at 11th and Wabash, where he had previously parked his car. (A. 127) However, he did not go to his car but asked the station attendant to phone for a cab. (A. 14) The petitioner then went to the station washroom and looked through the window. He saw uniformed police on the street and put the murder weapon in the toilet flush box. Meanwhile Officers Cowhey and Dunleavy had questioned the attendant. The officers then went to the washroom where they arrested the petitioner. (A. 128) Detective Thedos arrived and assisted in the arrest, handcuffing Witherspoon to himself. The defendant said nothing at this time. (A. 20)

The three officers then drove the petitioner to St. Luke's Hospital. (A. 18) Officer Mitchell Stone had been taken to the emergency room of St. Luke's. He was conscious but was suffering from an abdominal bullet wound which subsequently caused a fatal hemorrhage. (A. 41-42) Later, Witherspoon said he aimed and shot low at Officer Stone. (A. 137) When Witherspoon entered the emergency room, Officer Stone pulled himself up to a sitting position and said, "that is the man that shot me." (A. 8, 19) Officer

Marzillo also identified the defendant in the emergency room. (A. 8)

When these identifications were made Witherspoon stood mute, but when Officers Cowhey, Dunleavy and Detective Thedos returned with Witherspoon to the squad car and began to drive away from the Hospital, Witherspoon admitted that he shot Officer Stone. (A. 19, 22, 34)

The squad car was driven back to the gas station at 11th and Wabash. While they had been away Officer Downes and the station attendant, James Clements, had found the murder weapon in the flush box where petitioner had hidden it. Officer Downes showed the gun to Witherspoon, who immediately identified it as his weapon, the one "I shot him with." (A. 19, 22)

Witherspoon was then taken to the First District Police Station at 1121 South State Street. There, the defendant gave interviews to newspaper reporters and lectured the police to the effect that younger officers should be taught how to frisk persons and how to shoot. (A. 35, 36, 44, 67, 68, 137). Witherspoon informed the police that the tattoo on his left-hand knuckles read "l-o-v-e" and that the tattoo on his right hand knuckles read "h-a-t-e". He stated that the word "h-a-t-e" meant "hate all police." (A. 100) The tattoos on his knuckles were visible at trial. (A. 144)

About two hours after the murder was committed, John Stamos, then an Assistant State's Attorney, arrived at the police station and took a written statement from the petitioner (A. 61, 88-95) Around 10:30 a.m. of the same morning the petitioner inquired after the health of Officer Stone and was informed that he had died. (A. 143) At noon, Witherspoon read the transcribed statement

taken from him by Mr. Stamos but refused to sign it until he saw an attorney. (A. 132)

The Litigation

A. Trial

The petitioner was indicted for murder by the October Term Grand Jury. During these State proceedings petitioner was represented by three appointed counsel, of whom the chief counsel was Thomas Cernek (then Chairman of the Chicago Bar Association Committee for the Defense of the Indigent). Counsel for petitioner filed a motion requesting a Behavior Clinic examination. (R. 57) The motion was granted, an examination was had, and petitioner was found competent by the court psychiatrist. (Rec. 82-85)[1] No further motion for additional psychiatric examinations or for a competency hearing were made. (Abst. 68) A motion to suppress petitioner's statement was also filed, and an extensive hearing on the motion was conducted. (R. 140-621) The motion was denied, the trial court finding the statement to be voluntary. A jury was impanelled and a lengthy trial was had, after which the jury returned a verdict of "guilty". The punishment was fixed at death. The court entered judgment on the verdict and sentenced the petitioner to death on April 25, 1960. (A. 1-4)

B. Appeal

The Supreme Court of Illinois appointed James L. Coghlan and the firm of Coghlan, Coghlan and Joyce as counsel for petitioner on appeal. Counsel filed an exten-

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1. "Rec." refers to the record of the proceedings on the instant petition in the Circuit Court of Cook County.

sive brief alleging some fifteen separate trial errors.[2] The petitioner expressly waived any challenge to the ruling on the motion to suppress. (A. 4) On March 25, 1963, the Supreme Court of Illinois affirmed petitioner's conviction and filed a lengthy opinion. *People* v. *Witherspoon,* 27 Ill. 2d 483, 190 N.E. 2d 281. A petition for rehearing was denied.

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2. Petitioner states that counsel filed the brief without consulting him. (Petitioner's Brief, p. 8). This point was debated below in the context of a waiver argument propounded by the People. The Supreme Court of Illinois declined to rule on the waiver point but instead considered the merits directly. Nevertheless, the respondent cannot leave unchallenged the incredible statement that petitioner was not consulted on his appeal.

Petitioner had the rare fortune to have a skilled appeal counsel who, not having represented petitioner at trial, was not committed to any tactical decisions made at trial. Petitioner alleged that "On one occasion, petitioner's court-appointed counsel wrote petitioner a letter advising petitioner of the grounds which counsel intended to raise on the appeal, but counsel did not offer or permit petitioner to determine what should be argued and what should not be argued on the appeal. Mr. Justice Schaefer commented that "This allegation is hardly consistent with the petitioner's assertion that there was no knowing waiver on direct review" *People* v. *Witherspoon,* 36 Ill. 2d 471, 224 N.E. 2d 259, 262 (1967) (Appendix A—Petitioner's Brief, App. 3). The conclusion of the Court is fortified by several incidents. At trial, petitioner insisted on calling a witness against the advice of counsel and after admonition by the court. (R. 1326-1328). Petitioner hardly exhibited a sheepish deference to decisions of counsel. Indeed, petitioner is quite capable of filing his own Supplemental Brief when dissatisfied with his counsel. In the instant case Mr. Jenner filed his brief in the Supreme Court of Illinois on October 22, 1966. On Novem-

C. First Collateral Attack in Federal Courts.

The petitioner, with the aid of his third capable court-appointed counsel, Julius Echeles, sought a writ of *habeas corpus* in the United States District Court, Northern District of Illinois. On November 4, 1963, the writ was denied for failure to exhaust state remedies.

D. First Collateral Attack in Illinois Courts.

Petitioner attacked his conviction by pursuing both *habeas corpus* relief and the statutory post-conviction remedy. Petitioner challenged the admissibility of his statement and the procedure by which the jury fixed petitioner's penalty. The arguments urged on appeal were generally reiterated under a theory that the "totality of errors" deprived petitioner of his right to a fair trial. The trial court dismissed the petition, and the Supreme Court of Illinois affirmed on January 17, 1964, in an unreported opinion.

E. Second Collateral Attack in Federal Courts.

The petitioner again sought federal *habeas corpus* by filing an amended version of his first federal petition. His petition, filed by Mr. Echeles, challenged the admissibility of his confession and the procedure by which the jury

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ber 8, 1965, petitioner filed a Supplemental Brief over his own signature, and the ineptitude of the Supplemental Brief leaves no doubt that it was drafted by petitioner. On petitioner's original appeal he never filed any supplemental brief or letter of protest during a period of several months between the filing of briefs, the argument and the decision of the case. Under the particular facts of this case, it cannot be disputed that petitioner knew of counsel's proposed actions and agreed with them.

fixed the penalty. The petitioner offered no evidence on the confession issue, which was resolved by a review of the extensive state court hearing. On March 24, 1964, the Court remarked that "I do not see that it was coerced." (March 24, 1964, Hearing Transcript, p. 7)[3] Then the Court denied the writ as to petitioner's claim that admissibility of the statement was determined by use of an improper standard, but awarded the writ to the extent of remanding petitioner to the state court for a hearing in mitigation prior to imposition of sentence.

Appeals from the rulings of the District Court were taken by both parties. On September 28, 1964, in a lengthy opinion, the Court of Appeals reversed that part of the District Court's order awarding the writ and remanded the cause with directions to dismiss the petition. *United States ex rel. Witherspoon* v. *Ogilvie*, 337 F. 2d 427 (7th Cir.)

F. Petition For Certiorari Denied.

The petitioner sought a writ of *certiorari* from this Court to the Court of Appeals. Mr. Echeles' petition challenged the standard by which petitioner's statement was judged admissible and the use of the "Orthodox" rule for determining voluntariness, contending that *Jackson* v. *Denno*, 378 U.S. 368, rendered the use of this method unconstitutional. In the petition it was argued further that petitioner's statement was inadmissible under the rule of *Escobedo* v. *Illinois*, 378 U.S. 478, and that the procedure by which petitioner's sentence was fixed was unconstitu-

3. This transcript is contained in the Record which was before this Court in 1964 when it denied certiorari. [No. 602 Misc.—379 U.S. 950]

tional. Respondents filed a brief in opposition, and petitioner replied. *Certiorari* was denied on December 14, 1964. *Witherspoon* v. *Ogilvie*, 379 U.S. 950.

G. Third Collateral Attack in Federal Courts.

Petitioner filed another petition for the writ of *habeas corpus*, and his present counsel were appointed to represent him. Although respondents expressly stated their willingness to stipulate that all state remedies had been exhausted, petitioner's counsel insisted on returning to the state courts to further exhaust state remedies. In February, 1965, the District Court entered an order staying further proceedings until petitioner had exhausted all available state remedies.

H. Second Collateral Attack in State Courts.

On February 19, 1966, petitioner filed a petition demanding some remedy and suggesting several possible remedies. Of these suggested remedies, five were abolished by the Civil Practice Act of Illinois, one was barred by the limitations of the Civil Practice Act, one was barred by statute and court rule, and the last was based on a repealed statute. (Abst. 2-3, 15-8) The respondents filed a motion to strike the petition for lack of jurisdiction and then a motion to dismiss the petition. The court acted on neither motion. The substance of the petition will be discussed in *Reasons For Denying the Writ, infra*. The petitioner appealed the dismissal, and, on the appeal, petitioner filed a Supplemental Brief of his own. The Supreme Court affirmed. 36 Ill. 2d 471, 224 N.E. 2d 259 (Appendix A, Petitioner's Brief).

The instant petition requests that a Writ of *Certiorari* issue to the Supreme Court of Illinois, to review this latest judgment.

ARGUMENT

I.

THE DISQUALIFICATION OF VENIREMEN HAVING CONSCIENTIOUS OR RELIGIOUS SCRUPLES AGAINST IMPOSITION OF THE DEATH PENALTY IN A CAPITAL CASE PRESENTS NEITHER A NOVEL NOR A SUBSTANTIAL ISSUE.

In the court below the petitioner argued for the first time that a juror, who will not under any circumstances sign a death penalty verdict, should not be disqualified from sitting in judgment when the People demand the death penalty for the murder of a policeman. The petitioner claims that such disqualifications deprived him of a 'representative' jury. Yet, "it will readily be seen that this 'balanced jury,' which the defendant envisages, is in reality a partisan jury." *United States* v. *Puff*, 211 F. 2d 171 (2nd Cir. 1954). See *Pope* v. *United States*, 372 F. 2d 710 (8th Cir. 1967); *United States ex rel. Dukes* v. *Sain*, 247 F. 2d 799, 802, 803, (7th Cir. 1962), *cert. denied*, 369 U.S. 868. Under Illinois law any juror can hang the jury if he cannot have his way as to the sentence which he deems appropriate. *Cf. Andres* v. *United States*, 333 U.S. 740, 766 (1948) (concurring opinion). The petitioner seeks to place in the seat of judgment one or more jurors who are irrevocably opposed, before hearing a word of testimony, to the verdict sought by the People. *People* v. *Hobbs*, 35 Ill. 2d 263, 277, 220 N.E. 2d 469, 474 (1966).

In a case involving the disqualification of jurors for scruples against imposition of the death penalty, this Court said—"A juror who has *conscientious scruples* on

any subject which prevent him from standing indifferent between the government and the accused, and from trying the case according to law and the evidence is not an impartial juror." *Logan* v. *United States*, 144 U.S. 263, 298 (1892). (Emphasis added.) For the relatively objective criterion of "conscientious scruples" on which jurors may be examined under oath on *voir dire*, petitioner wishes to substitute criteria such as "prosecution prone", "defense prone" or even "authoritarian personality."[4] One wonders how, without ordering psychiatric examinations for an entire venire, such psychological "proneness" can be discovered during *voir dire*.

The idea of "proneness" is not related in any way to the legal standard of impartiality. Petitioner cites surveys purporting to disclose that some jurors qualified for the death penalty are "prosecution prone" and that jurors with scruples against the death penalty are "defense prone". Where then is the "impartial" juror? It is not surprising that the Illinois Supreme Court decided to "adhere to the system where each side is allowed to examine jurors and eliminate those who can not be impartial." *People* v. *Witherspoon*, 36 Ill. 2d at 476, 224 N.E. at 262.

In *Turberville* v. *United States*, 303 F. 2d 411 (D.C. Cir. 1962), *cert denied*, 370 U.S. 946, the Court observed that "being not opposed to capital punishment is not synonomous with favoring it." Juries qualified to return a death penalty verdict have frequently returned verdicts of "not guilty" and verdicts of "guilty" without fixing the death penalty. "Individuals may indeed be so prejudiced in respect to serious crimes that they cannot be impartial

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4. Oberer, "Does Disqualification of Jurors For Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt," 39 Tex. L. Rev. 545, 553 (1961).

arbiters, but that extreme is not indicated by mere lack of opposition to capital punishment." *People* v. *Hobbs*, 35 Ill. 2d at 273, 220 N.E. 2d at 474.

If the government of the People enacts a law proscribing certain conduct and prescribing certain penalties, no man has a right to have individuals unalterably opposed to the law given the power to nullify the law. In *People* v. *Riser*, 47 Cal. 2d 566, 305 P. 2d 1 (1956) (Traynor, J.), *appeal dismissed*, 358 U.S. 646 (1958), the Court said that abolition of the disqualification of jurors with scruples against the death penalty "would in all probability work a *de facto* abolition of capital punishment."

This Court should allow its own precedents, the opinions of the various Circuit Courts of Appeal and the opinions of the State Appellate tribunals to stand.

II.

THE ILLINOIS STATUTE PROVIDING THAT THE JURY SHOULD FIX THE PUNISHMENT IN A MURDER CASE DID NOT IN EFFECT UNCONSTITUTIONALLY PENALIZE PETITIONER FOR EXERCISING HIS RIGHT TO A JURY TRIAL.

Petitioner again attempts to raise substantially the same argument which was rejected once before by the Court of Appeals [*United States ex rel. Witherspoon* v. *Ogilvie*, 337 F. 2d 427, 431 (7th Cir. 1964)], and which was thereafter presented to this Court and found insufficient to warrant grant of *certiorari*. [*Cert. denied*, 379 U.S. 950] This argument is that the defendant was required to forego the opportunity to introduce mitigating evidence as the price of a jury trial.

The States have always been given wide leeway in dividing responsibility between judge and jury in criminal cases [*Spencer* v. *Texas*, 87 S. Ct. 648, 652 (1967)]. The practice of allowing the jury to fix the penalty in a criminal case has been held to be constitutional. [*Lindsey* v. *United States*, 133 F. 2d 368 (D.C. Cir. 1942)], and is the prevailing practice in the country. Further, the complete absence of a hearing in aggravation or mitigation, as where a mandatory penalty is provided, does not violate due process. *Williams* v. *New York*, 337 U.S. 241, 252 (1947); *People* v. *Burnett*, 394 Ill. 420, 425, 68 N.E. 2d 758 (1946).

In the instant case petitioner was not prohibited from introducing mitigating evidence during the trial of the case. The decisional law of Illinois expressly gives petitioner this privilege. "Evidence must be admitted if it tends to prove a substantial ground to lessen the punishment and to reduce it below the maximum fixed for murder." *People* v. *Crump*, 5 Ill. 2d 251, 258, 125 N.E. 2d 615, (1955). See also *People* v. *Mangano*, 375 Ill. 72, 77, 30 N.E. 2d 428 (1940). The trial record reflects references to petitioner's unfortunate childhood and his prior naval service. The very defense of accident offered by petitioner is mitigating in nature.

Significantly, the People are prohibited from introducing evidence in aggravation before the jury. Further it will be noted that only where a defendant testifies, in defense, that the State on rebuttal can impeach by a prior conviction for an infamous crime within the Illinois statutory enumeration. If the prior conviction is not "infamous" under the Illinois statute, it cannot be shown. Had the People been given this opportunity, they were prepared to show a long record of misconduct of petitioner in both civilian and military contexts. The petitioner was

distinctly advantaged by the procedure under which he was tried, and no constitutional question arises which would warrant grant of certiorari.

III.

THE IMPOSITION OF THE DEATH PENALTY FOR THE MURDER OF A POLICE OFFICER ACTING IN THE LINE OF DUTY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

The petitioner attacks the imposition of the death penalty in his case, giving three grounds to support his argument.

First, the petitioner claims that he is "rehabilitated." Under Illinois law there is no provision for a collateral attack on sentence, nor is there any provision for judicial determination of question of rehabilitation. However, Illinois is one of the few states in which the executive recognizes "rehabilitation" as a ground for commutation of sentence. When petitions for clemency are filed, the Pardon and Parole Board conducts full hearings and makes recommendations to the Governor in whose hands the decision finally rests. The Illinois procedure is outlined in Lavinsky, "Executive Clemency; Study of a Decisional Problem Arising In The Terminal Stages Of The Criminal Process," 42 Chi-Kent L. Rev. 13 (1965).

In *Solesbee* v. *Balkcom*, 339 U.S. 9 (1950), it was held that due process is served when the issue of competency for execution is determined by the Governor of a state aided by the recommendations of experts. The procedure in *Solesbee* did not allow for an adversary proceeding or the opportunity to present evidence. This Court further held that determination of competency for execution is a

matter related to the power of executive clemency. 339 U.S. at 12. See also *Caritativo* v. *California*, 357 U.S. 549 (1958). The instant case involves a far more conventional aspect of the exercise of executive clemency than in *Solesbee, i.e.*, the commutation of sentence for a "reformed" convict. The instant case also involves a far more conventional procedure in which an administrative body conducts public hearings at which a petitioner may be represented by counsel and may present evidence. The administrative body, exercising its expert judgment, makes recommendations to the Governor. The instant case is controlled *a fortiori* by *Solesbee*.

Second, petitioner contends that the death penalty serves no legally acceptable purpose of punishment.

Petitioner grounds his argument on the assertion that modern scientific knowledge demonstrates that capital punishment has no deterrent or other redeeming social benefit. The claim is exaggerated. Studies of the death penalty are inconclusive and no study has ever been made of murders that have not been committed, and this seems to be the relevant subject of study. Every year several dozen robberies or burglaries are committed by men who carry unloaded guns. This fact alone would indicate that there is a substantial possibility that at least a small number of innocent lives are saved by the existence of the death penalty. Even the chance that a small, statistically insignificant number of lives may be saved is sufficient to justify the application of the death penalty to convicted murderers.

The imposition of capital punishment also serves the purpose of permanently incapacitating the convicted murderer. This is certainly a legally acceptable purpose of punishment and, in light of a recent case in Illinois where

four inmates were convicted for the murder of prison guards,[5] not a meaningless fiction.

Finally, the infliction of the death penalty upon petitioner for the murder of a uniformed policeman acting in the line of duty serves to reinforce societal inhibitions against killing, harming or seriously attacking police officers, whose duty requires both proximity and vulnerability to the violent events of a modern life.

Third, petitioner claims that the death penalty is proper when inflicted on those who murder for hire or other direct economic gain, and he contends he does not belong in this class of persons. The record belies this contention. Shortly after the murder Witherspoon said that Officer Stone had a job to do and "I had a job to do. I was hot and I didn't want to be taken in. I was wanted for robberies in Detroit, I had been in the penitentiary before and I didn't want to go back. That's why I shot." (A. 54) Witherspoon said he was "very careful in that night in all my activities" (A. 138). He also disclaimed any personal animosity toward his victim. "I don't have no thrills at shooting him or nothing like that. It was my job. I was trying to get away." (A. 94) It is significant that petitioner uses the word "job" to describe his conduct, much as one who kills for hire would. Witherspoon coldly and deliberately killed a policeman for the purpose of securing his escape from rightful imprisonment. There is nothing in the facts herein which justifies a differentiation between petitioner and the class of murderers which petitioner arbitrarily creates.

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5. *People* v. *Stamps et al.*, Circuit Court, Seventh Judicial Circuit, Sangamon County, Illinois (1967).

Fourth, petitioner complains of the repeated delays and setting of dates of execution in his case. The various delays and re-setting of dates of execution are due to proceedings initiated by the petitioner himself in State and Federal Courts, and self-caused pressures obviously cannot constitute a deprivation of constitutional rights. *Cf. Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459 (1947). The combination of delay and approaching dates of execution are nothing less than a windfall to petitioner, for they create publicity and the opportunity to get support for petitioner's cause. Lavinsky, "Executive Clemency" 42 Chi-Kent L. Rev. at 27-28. The setting of dates of execution is necessary to allow petitioner to pursue whatever remedies are left to him by a certain date, to warn petitioner so that he may put his personal affairs in order, and to encourage petitioner's dispatch in pursuing his remaining remedies so as to avoid delays such as those which petitioner now attacks. The only other alternative to the practice followed is for executions to be carried out without any previous notice.

Ever since the case of *In re Kemmler,* 136 U.S. 436 (1890), in which this Court held that the imposition of the death penalty by means of electrocution was not cruel and unusual punishment within the meaning of the federal constitution, the courts have consistently sustained the constitutionality of capital punishment. *E.g. Trop* v. *Dulles,* 356 U.S. 86, 99 (1957); *Jackson* v. *Dickson,* 325 F. 2d 573, 575 (9th Cir. 1963), *cert. denied,* 377 U.S. 957 (1964). There are, of course, differences of opinion about the wisdom of capital punishment, but debates about the wisdom of capital punishment belong in the legislatures and not in constitutional forums such as this Court. Congress has provided the death penalty in cases involving

kidnapping, wrecking trains, treason, narcotics, murder of federal agents, bank robbery, espionage, explosives and assassination of the President or Vice-President.[6] New York, which is the only State with large concentrations of urban population to recently abolish the death penalty, would still impose the death penalty on petitioner, since he killed a uniformed police officer acting in the line of duty. Sec. 1045, New York Penal Law, McKinney's Consol. Laws (Supp. 1966). Finally, in Illinois, whose legislature debates the question each session, the House of Representatives defeated a bill providing for a moratorium on the death penalty by a vote of 98 to 68. Illinois Journal of the House of Representatives, May 17, 1967, pp. 33-34 (H.B. 157).

Petitioner's claim that the death penalty in his case is cruel and unusual punishment is without merit.

IV.

THE PETITIONER'S NUMEROUS STATEMENTS WERE VOLUNTARY AND THE FACTS SURROUNDING THE STATEMENTS WERE FULLY PRESENTED.

In the court below petitioner argued that his confession was inadmissible under the rule of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). The same argument had been presented to this Court when *certiorari* was denied previously.

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6. Kidnapping, 18 U.S.C. 1201; Wrecking Trains 18 U.S.C. 2381; Treason 18 U.S.C. 2381; Selling Narcotics to a Minor, 21 U.S.C. 176 (b); Murder, 18 U.S.C. 1111, 1114; Bank Robbery, 18 U.S.C. 2113, Espionage 18 U.S. 794, 42 U.S.C., 2272, 2274, 2276; Explosives 18 U.S.C. 837; Assassination of President, 18 U.S.C. 1751.

[*Witherspoon* v. *Ogilvie,* Sheriff, 379 U.S. 950 (1964).] Petitioner now abandons this same argument and shifts to a new ground, never presented to any other court. Petitioner's brief in the court below was, of course, filed before *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). He now claims that he should have been allowed to show that he was not warned of his right to remain silent or of his right to counsel.

That petitioner even makes his claim is somewhat surprising. He previously claimed with great vigor that the record established a violation of *Escobedo,* yet now he asserts the record is unclear.

In fact, the trial and the motion to suppress did fully elucidate the facts surrounding the various statements made by petitioner. These facts will be reiterated here because they show that under the "totality of circumstances" the statements were voluntary and that the state court's findings of voluntariness was supported by the record. See *United States ex rel. Witherspoon* v. *Ogilvie,* 337 F. 2d 427, 430. The record shows that petitioner was a 36-year old man at the time of his confession. In the words of his federal *habeas corpus* counsel, petitioner "had been previously convicted of crime. He was wanted as a suspect for other crimes in Michigan. He was not inconversant with his rights." (*Brief for Relator, Witherspoon* p. 23, United States Court of Appeals). Petitioner testified he was arrested around 4:30 A.M. on April 29, 1959 at the gas station at 11th and Wabash. He was then taken in a squad car to St. Luke's Hospital where he was identified by the dying Officer Stone and by Stone's partner Officer Marzillo. Petitioner claimed that, as he was leaving the hospital, several officers including Marzillo swung at him and that some blows landed. (Rec. 140-163.) Mar

zillo and the other officers at the hospital specifically denied this. (Rec. 395-397; 288-595).

The defendant returned to the squad car with the arresting officers. As the squad car started back to the gas station, Officer Cowhey told petitioner "You've been identified." Petitioner then said "All right, I shot him." (Abst. 34, 22). After arriving at the gas station petitioner was shown the murder weapon which other officers had found, whereupon petitioner said, "that's the gun I shot him with" (Abst. 19, 22).

Thus the record shows that within at most one half-hour after arrest petitioner had confessed on two occasions with little or no formal interrogation. The record further shows these statements were made while in the custody of Officers Dunleavy, Cowhey and Thedos. Petitioner repeatedly testified that none of these officers beat or threatened him and had no complaint about any of the acts of these three officers. (Abst. 140-41, Rec. 235-38)

Petitioner was then taken to police headquarters where he elaborated on his motive in killing Officer Stone. "I was hot. I'm wanted for a jewel robbery in Detroit" (A. 38, 54). He lectured the police on the training of young officers in searching and marksmanship. (A. 36, 54, 44, 67, 137.) Petitioner gave a detailed oral confession to Captain Pape. (A. 65-67). According to petitioner, he was repeatedly beaten and threatened at this time, the beatings and threats led to his final statement. (Rec. 177.) The allegations of beatings and threats were repeatedly and specifically denied. (Rec. 288-595.)

Petitioner's final statement was given to John Stamos, then an Assistant State's Attorney, and a court reporter. The statement began about 6:45 A.M., just over two hours after arrest. Petitioner asserted at trial that he requested

of Mr. Stamos and Captain Pape the opportunity to consult counsel. (R. 1559, 1480.) Mr. Stamos and Captain Pape denied that requests had been made prior to the giving of the final statement. The testimony of Mr. Stamos reveals that petitioner refused to give the statement because he had told his story four or five times already. (Abst. 60.) When the court reporter arrived, Mr. Stamos began to ask questions and petitioner gave answers. Petitioner indicated his desire to start the statement again. (Abst. 62.) Petitioner claimed that he stated "I will not go any further until I talk to a lawyer" during the first recorded statement, yet the court reporter's transcript conclusively shows the request was not made. (Abst. 49-53, 87) (People's Exhibit 5A).

The transcript of petitioner's complete recorded statement indicates that petitioner was warned of his right to remain silent and had indicated his desire to make a statement. (A. 88-89.) At the end of the statement, petitioner indicated he would sign in the presence of a lawyer. Petitioner asserted he had not been able to make a phone call. Mr. Stamos offered him the immediate opportunity to make a call. Petitioner replied that he would make a call after the statement was typed. (A. 95.) Petitioner made one definite request for counsel after the statement was made. In response petitioner was given a phone and the classified directory. Petitioner then said "forget it". (Abst. 132, 156.)[7] In any event, petitioner refused to sign the statement after he requested counsel. (Rec. 365.) In the interval between the giving of the statement and the time it was typed and prepared for signing, petitioner had slept

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7. It is significant that at trial, defense counsel understood that petitioner's request for counsel was made after the statement was given. (Abst. 183, Rec. 1590.)

several hours and on awaking inquired after the health of Officer Stone, whom he "thought had been merely wounded," and was then informed of his death. (Abst. 143, Rec. 1468.)

The facts surrounding petitioner's statements are fully shown in the record and those facts do not justify any further review of the issue by this or any Court.

V.

THE DECISION OF THE ILLINOIS SUPREME COURT, THAT THE TRIAL COURT WAS CORRECT IN DENYING PETITIONER A HEARING TO PRESENT NEWLY DISCOVERED EVIDENCE, WAS IN ACCORDANCE WITH WELL-SETTLED FEDERAL LAW.

The Illinois Supreme Court held that the trial court was correct in denying petitioner a hearing to present newly discovered evidence, for the reason that the petition failed to show that the "newly-discovered" evidence was conclusive and not merely cumulative. This decision is in accord with federal law, since the federal courts hold that it is incumbent on a party asking for a new hearing to show that:

1) The evidence has been discovered since trial;

2) The petitioner has been diligent in obtaining the allegedly new evidence;

3) The evidence is not merely cumulative or impeaching;

4) The evidence is material;

5) The evidence would probably produce an acquittal.

United States v. *Rutkin*, 208 F. 2d 647, 649, (3rd Cir.

1953), cited as authority in *Mesarosh* v. *United States*, 352 U.S. 1, 9, 10, fn 4 (1956)].

Additionally, the federal courts require that an affidavit of the witness be produced, or its absence accounted for. [*United States* v. *Johnson*, 142 F. 2d 588, 592 (7th Cir. 1944) cited as authority in *Mesarosh* v. *United States*, 352 U.S. 1, 9, 10, fn 4 (1956)].

Since the petition filed by Witherspoon in the trial court failed to meet these standards, which are substantially the same as the state court criteria, the trial court was correct in denying petitioner a new hearing. Accordingly the Illinois Supreme Court's affirmation of that ruling was also correct.

VI.

THERE IS NOT NOW, NOR WAS THERE EVER ANY BONA FIDE DOUBT OF PETITIONER'S COMPETENCY TO STAND TRIAL.

Petitioner's attorneys at trial requested a Behavior Clinic Examination. The examination was had and the psychiatrist at the Clinic concluded that petitioner knew the nature of the charge and was able to cooperate with counsel. (Abst. 42, Rec. 82-85).[8]

The petitioner does not allege that he was incompetent at the time of trial. The only reference to incompetency is found in counsel's motion for a Behavior Clinic Examination. It has been held that the statements of counsel

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8. "Rec." refers to the record of the proceedings below which gave rise to the instant petition.

alone do not, without more, create a *bona fide* doubt of competency. *People* v. *Foley*, 28 Ill. 2d 426, 192 N.E. 2d 850 (1963). The mere fact that counsel requests an examination does not create a bona fide doubt. *People* v. *Cleggett*, 22 Ill. 2d 471, 474, 177 N.E. 2d 187 (1961), *People* v. *Harper*, 31 Ill. 2d 51, 56, 198 N.E. 2d 825, 828 (1964). The question of whether the report was in fact filed in the trial court is irrelevant. Nothing in the report served to raise a *bona fide* doubt of competency.

The federal practice in this regard is enlightening. Under 18 U.S.C. 4244, 63 Stat. 686, upon a showing of reasonable cause, a psychiatric examination may be ordered for a defendant. It is doubtful that petitioner could show even reasonable cause for an examination in federal courts. See *Hawks* v. *Peyton*, 370 F. 2d 123 (4th Cir. 1966). Assuming a federal defendant, like petitioner, is granted an examination, a hearing is required then only if the psychiatrist finds some mental incompetency or insanity. If the psychiatrist reaches a diagnosis that defendant is competent, no hearing is required. *Hereden* v. *United States*, 286 F. 2d 526 (10th Cir. 1961). *Cf. Whalem* v. *United States*, 346 F. 2d 812, 815 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 836, *reh'g. denied*, 382 U.S. 912. It is clear that under federal law, petitioner could not claim that he was entitled to a hearing.

In this case, petitioner asked for an examination; he received it and was diagnosed as competent. The question of his competency was never again raised. No evidence tending to show incompetency was offered either then or now, no claim of incompetency was ever made either then or now, no hearing as to competency was ever requested before, during or immediately after trial. If it is constitutionally required under these circumstances that a trial

judge *sua sponte* order a competency hearing, then all the prevailing State and Federal law is unconstitutional.

VII.

THE ILLINOIS PRACTICE OF ALLOWING IMPEACHMENT OF A DEFENDANT WHO TESTIFIES, BY PROVING THAT THE DEFENDANT HAS BEEN PREVIOUSLY CONVICTED OF AN INFAMOUS CRIME, IS IN ACCORD WITH WELL-ESTABLISHED PRINCIPLES OF BOTH FEDERAL AND STATE LAW, AND NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS RAISED BY THE ILLINOIS SUPREME COURT'S APPROVAL OF SUCH A PRACTICE.

The petitioner notes that at trial, after he had taken the stand to testify in his own defense, the State introduced proof that he had been previously convicted of a statutorily defined "infamous crime." Petitioner argues that the Illinois statute which authorizes the State to so impeach his credibility violates his rights under the Due Process clause, in that it penalizes him for exercising his constitutional right to testify in his own behalf. This contention is without substantial merit and should not provide a basis for grant of certiorari.

No useful purpose would be served by citing the innumerable cases, both federal and state, where substantially the same practice was followed in a trial court with a subsequent denial of certiorari in this Court. It is perhaps sufficient to note that in a recent case this Court commented that evidence of past crimes could be admitted "when the defendant has testified and the State seeks to impeach his credibility." [*Spencer* v. *Texas*, 87 S

Ct. 648, 652 (1967)] This Court also recognized that the Texas cases cited for that proposition "reflect the rules prevailing in nearly all common-law jurisdictions." [87 S. Ct. at 652 fn 7]. The respondents herein do not rely on the magnitude of the practice, but rather on the fact that it is not fundamentally unfair to introduce evidence relating to a defendant-witness' credibility. And as long as the State criminal procedure does not deny petitioner a constitutionally fair trial, this Court has not in the past interferred with what are essentially matters of State concern. While the *Spencer* case is perhaps not as closely on point as numerous other federal or state court cases, the respondents would point out one brief comment which they feel is governing here.

> "But it has never been thought that such cases [holding that Due Process guarantees a fundamentally fair criminal trial] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority." [87 S. Ct. at 653, 654.]

The respondents submit that review of this Illinois criminal procedure, by grant of certiorari, is neither warranted nor necessary.

CONCLUSION

For the foregoing reasons the respondents ask that the petition for certiorari be denied.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (346-2000),
Attorney for Respondent, People of the State of Illinois.

JOHN J. STAMOS,
State's Attorney of Cook County, Illinois,
500 Chicago Civic Center,
Chicago, Illinois 60602,
Attorney for Respondent, Joseph Woods, Sheriff of Cook County, Illinois.

JOHN J. O'TOOLE,
DONALD J. VEVERKA,
Assistant Attorneys General,

ELMER C. KISSANE,
JAMES B. ZAGEL,
JOEL M. FLAUM,
Assistant State's Attorneys,
Of Counsel.